Nos. 11,943, 11,944, 11,946

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES W. AGNEW, JR., et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,943	
JOHN W. GRIFFIN, et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,944	CONSOLIDATED CASES
AUGUST FEDERER, et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,946	

Petition for Rehearing and Motion to Stay Mandate

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PETITION FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now *American President Lines, Ltd.,* Appellee in the above-entitled consolidated causes, and respectfully petitions this Court for a rehearing upon the grounds and for the reasons hereinafter set forth:

INTRODUCTORY COMMENTS

By its decision in the *Agnew* case (No. 11,943) dated May 5, 1949, amended May 6, 1949, and further amended May 18, 1949, and by its decisions in the *Griffin* case (No. 11,944) and the *Federer* case (No. 11,946) dated May 6, 1949, set aside on May 19, 1949 and supplanted by a per curiam opinion on that day and supplemented by a further decision in the *Griffin* case on May 28, 1949, this Court reversed the decision of the District Court, in part, by decreeing that war bonus was payable to Appellants during their internment and affirmed the decision of the District Court, in part, by decreeing that maintenance was not payable to Appellants during internment. The Appellants in all the consolidated cases have petitioned this Court to modify its decisions and allow Appellants interest and costs but have not challenged the affirmance by this Court of the decree of the District Court denying the recovery of maintenance during internment. This Petition for Rehearing by the Appellee is directed to the reversal by this Court of the decree of the District Court denying recovery of war bonus during internment.

In so reversing the decree of the District Court this Court committed grave error. The written decisions of this Court in the present case do not cite, and reflect no consideration of, a previous decision by this Court on March 13, 1946, in *Steeves et al. v. American Mail Line, Ltd.*, (*The Capillo*), 154 F.2d 24, in which this Court construed the same collective bargaining agreements (supplementary bonus agreements) as are involved in the present case, in a manner diametrically opposed to the construction placed by this Court on such agreements in the present case. In ruling that shipping articles exclusively define terms of employment of crew members aboard ship, this Court has ascribed to certain Federal statutes a purpose and effect never intended; improperly subordinated the role of collective bargaining agreements under the National Labor Relations Act and decisions of United States Supreme Court; and ignored the applicability of collective bargaining agreements recognized by

the parties in this very case. In its consideration of the riders attached to the shipping articles and the supplementary bonus agreements this Court has misapplied rules of construction and has disregarded other controlling rules of construction. In such connection, this Court, in our opinion, has transgressed the boundaries of judicial function by rewriting rather than interpreting the contracts of the parties. In this regard, it has made interpolations in clauses of collective bargaining agreements to create provision for war bonus during internment notwithstanding that in a previous decision it had held these agreements so clear in excluding the payment of war bonus during internment on land that extrinsic evidence to such effect was held to be neither warranted nor necessary. Despite the fact that the determination of such issue is vital and necessary, the decisions of this Court in the present case indicate that the Court did not even consider the applicability of decisions of the Maritime War Emergency Board which controlled the internment rights of practically all merchant seamen during World War II and which have been judicially construed by other Federal courts as not providing for war bonus during internment on land.

Other reasons for granting a rehearing are indicated by the misconceptions with respect to various features of the case by this Court, evidenced by a series of amendments of and supplements to its original decision; by the pendency on appeal before this Court of two other cases involving the same issue; by the desirability of this issue being orally argued before all of the three judges participating in the decision before a conclusion is reached which will be determinative of all three cases; by the extreme importance of these cases to all parties involved; by the fact that the decisions of this Court in *The Capillo* case and in the present case are the only ones wherein merchant seamen have been awarded war bonus during internment; and by the fact that the Appellants themselves have petitioned this Court for modification or amendment of its decisions.

Before substantiating the foregoing assertions, we request that our forthright challenge of this Court's decisions in the present

case be not construed as to indicate any lack of respect for this Court. To the contrary, our desire to point out to this Court its errors is prompted by our confidence in this Court's objectivity and its willingness and ability to recognize and itself correct those errors, as well as by our desire to obtain complete and correct judicial consideration and determination of all the issues and questions involved in the present case.

THE COURT'S CONSTRUCTION OF THE SUPPLEMENTARY BONUS AGREEMENTS IS DIAMETRICALLY OPPOSED TO ITS CONSTRUCTION OF THE VERY SAME AGREEMENTS IN A PRIOR DECISION

Both the Appellants and the Appellee in the present case have claimed support for their respective contentions from the decision of this Court on March 13, 1946 in *Steeves et al. v. American Mail Line, Ltd.* (*The Capillo*), supra. That case also involved a claim by merchant seamen for war bonus during internment on land. The rider attached to the shipping articles of *The Capillo* read as follows:

> "The American Mail Line agrees to pay an emergency war bonus to the crew of the *S. S. Capillo,* voyage 6, in accordance with provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions.
>
> "In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific Coast: furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port, on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes.
>
> "The company agrees to reimburse each man so affected by the amount of $150.00 in the event of loss of personal effects by any member of the crew due to necessity of abandoning the ship resulting from torpedoing, mining,

bombing, shelling, scuttling or any other war causes, which results in the ship wreck of the vessel.

"The company also agrees to carry war risk insurance in the amount of $2,000.00 for each member of the crew, against loss of life as a result of war perils.

"It is further agreed that in the event of any increase in pay, overtime or war bonus, or changes in insurance, which may be granted, as the result of negotiations between the union and the Pacific American Shipowners' Association, the company will be governed by the terms and effective date of any agreement so reached."

In the second paragraph of the *Capillo* rider quoted above, provision was made for the eventualities of the vessel *or the crew* being interned, imprisoned, hospitalized or *put ashore*. It was expressly provided that if the crew be interned, imprisoned or put ashore, wages *and bonus* were to be paid "to the date members of the crew arrive in an United States port, on the Pacific Coast."

This specific and express provision for the payment of war bonus, as well as wages, in the event of the internment of the vessel or the crew was in no respect related to or dependent upon the crew members being in a war zone. Upon the happening of the eventuality contemplated, i.e., internment or putting ashore, etc. of the crew, specific provision was made for the payment of wages and bonus until the crew members were repatriated to the United States. The shipping company in that case sought to qualify this specific provision by reliance on the first paragraph of the rider to the effect that war bonus was to be paid "in accordance with provisions contained in the *applicable** supplementary agreements in effect between the Pacific American Shipowners' Association and various marine unions." In support of its contentions the shipowner introduced and referred to supplementary bonus agreements entered into between the Pacific American Shipowners' Association and the

*Emphasis supplied herein, so indicated.

Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, dated October 9, 1941 and with the Marine Cooks and Stewards Association of the Pacific Coast, dated October 10, 1941. Of the four libelants involved in that case, three were members of the first-mentioned union and the fourth, a member of the last-mentioned union.

Both of these supplementary bonus agreements are before the Court in the present case. All of the Appellants in the *Federer* case were admittedly members of the Marine Cooks and Stewards Association of the Pacific Coast and were therefore governed by the aforementioned supplementary bonus agreement with that union dated October 10, 1941 (Bryan's Ex. No. 50). A substantial number of the Appellants in the *Agnew* case were members of the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association. The aforementioned supplementary bonus agreement with this union dated October 9, 1941, is also before the Court in the present case (Bryan's Ex. No. 48). All of the remaining Appellants of the *Agnew* case were members of the Sailors' Union of the Pacific. The supplementary bonus agreement with this union, dated October 9, 1941, is identical in all material respects with the two supplementary bonus agreements previously mentioned, and, likewise, is before the Court in the present case (Bryan's Ex. No. 47).

The effect of these supplementary bonus agreements was squarely presented to this Court in *The Capillo* case because the Appellee in that case contended that these agreements rendered nugatory the specific provision contained in the second paragraph of the rider, quoted above, calling for the payment of bonus, as well as wages, following internment, until the crew members were repatriated. In rejecting such contention this Court held controlling the word "applicable" contained in the first paragraph of the *Capillo* rider and proceeded then to construe the provisions of these supplementary bonus agreements and to demonstrate that since they provided only for the payment of bonus during the ship's voyage westerly from and

easterly to the 180th Meridian they were not "applicable" to the specific agreement contained in the second paragraph of the *Capillo* rider to pay bonus during the period of internment and until the repatriation of the crew members. The construction of these supplementary bonus agreements was, therefore, a vital and essential determination in the decision of this court in *The Capillo* case. Since the agreements were rejected as not "applicable" because of the Court's construction that they provided for the payment of bonus only during the ship's voyage westerly from and easterly to the 180th Meridian and not during the period of capitivity and repatriation, it is inconceivable that such construction by this Court of the provisions of these supplementary bonus agreements could be classified as dictum.

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum."
>
> *Union Pacific R. R. Co. v. Mason City etc. R. R. Co.,* 199 U.S. 160, 26 S.Ct. 19, 50 L.Ed. 134, 137.

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."
>
> *Florida C. R. Co. v. Schutte,* 103 U.S. 118; 26 L.Ed. 327, 336.

See also:

Richmond Screw & Anchor Company v. U. S., 275 U.S. 331; 48 S.Ct. 194; 72 L.Ed. 303, 306;

Cameron v. U. S., 250 F. 943, 947 (9 C.C.A.) (Affirmed 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659);

Watson v. St. Louis etc. R. R. Co., 169 F. 942, 945 (Affirmed 223 U.S. 745, 32 S.Ct. 533, 56 L.Ed. 639).

We respectfully invite this Court to compare its construction of these supplementary bonus agreements in *The Capillo* case with its construction of these same agreements in the present case. For convenience of comparison, what this Court said about these two agreements in *The Capillo* case is set forth below on the left, and what this Court said about these same agreements in the present case is set forth below on the right.

THIS COURT'S CONSTRUCTION OF THE SUPPLEMENTARY BONUS AGREEMENTS IN THE CAPILLO CASE	THIS COURT'S CONSTRUCTION OF THE SAME SUPPLEMENTARY BONUS AGREEMENTS IN THE AGNEW AND FEDERER CASES
"Appellee contends that the two applicable agreements render nugatory the specific agreements of the second paragraph of the rider. Its argument as to the firemen and oilers union agreement, in effect from October 9, 1941, is that it makes no provision for any war bonus during captivity but provides for trans-Pacific voyages for a bonus of $80.00 per month for the period from the crossing of the 180th meridian westbound until the crossing of the same meridian eastbound. The contention is that since the vessel was destroyed and never could return to the 180th meridian, no bonus is due for the period in captivity and until repatriation, though specifically agreed in the second paragraph of the rider.	"That the sailors were captured and held in a war zone is further shown in the supplemental agreement with the sailors clarifying paragraph 5 of the rider, as follows:
	" '1. The following war bonus rules shall govern the parties hereto—
	(a) There shall be five war zones; namely:
	* * * *
	III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound.)'
"We do not agree. The pertinent word in the first paragraph of the rider with respect to the second paragraph is the word 'applicable' in the phrase 'in ac-	"It is a rational interpretation to regard the men, the vessel and the voyage as *not* the *war zone*. Rather each of the three is *in* the war zone. The men remained

cordance with the provisions contained in the *applicable* supplementary agreements.' Since, if rational, we must construe the second paragraph to give effect to its agreements, we construe the provision of the union agreement for period of bonus during the return voyage of the ship to the 180th meridian as not 'applicable' to the specific agreement to pay one during the period of captivity after the ship's destruction in Manila.

"The same is true of the cooks and stewards union agreement. There the war bonus period is during the ship's voyage westerly from and easterly to the 180th meridian. It is not applicable to a case of the destruction of the vessel and the subsequent period of captivity and repatriation specifically provided for in the second paragraph of the rider.

"It was thought that there was some ambiguity in the provisions of these instruments which warranted testimony as to their meaning. We do not agree. It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles. It is a matter of construction whether such union agreements are applicable to make nugatory the specific agreement for the internment."

employees in the zone during the internment, expressly a contemplated incident of the employment contract.

"The war bonus rules concern the employees who are to receive it. Hence 1(a) III, construed in connection with paragraph 6 of the rider, rationally should be read as

" 'III. (For employees on) trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (the war zone is) (After (the employees) crossing the 180th Meridian westbound, until (their) recrossing the same Meridian eastbound.' "

In *The Capillo* case this Court held that the pertinent provisions of the supplementary bonus agreements provide only for the payment of war bonus during the voyage of the vessel westerly from and easterly to the 180th Meridian and that "the union agreements did not provide for the bonus during the period specifically provided in the shipping articles" i.e., during the period of captivity or internment. In fact, this Court held that this meaning of these agreements was so free from ambiguity that "It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles."

The lower court in the present case (73 F. Supp. 944, 949) held:

> "The supplementary agreements do not provide for war bonuses during the crew's internment on land. So much has been decided in this Circuit in Steeves v. American Mail Line, 9 Cir., 154 F.2d 24. There the court construed two of the same supplementary agreements here involved (Resp. Ex. A, Bryan Ex. 48, 50), and held that the bonus areas therein designated pertained only to the sea and to voyages thereon. Nevertheless, recovery of war bonus in that case was allowed, because the riders to the shipping articles specifically provided for the payment of the bonus to the crew, if they were interned due to war causes, for the period of their internment and until their arrival back in the United States. The Court held this specific provision of the riders to be controlling as against the claim that the supplementary agreements applied. In the latter, the zones were defined in terms of voyages, and, as to Trans-Pacific voyages, were limited to that portion of the voyage occurring west of the 180th meridian. Land was not included within the war zone area therein encompassed. Steeves v. American Mail Line, Ltd., supra."

The Appellants, as well as the District Court, have recognized that this Court construed the supplementary bonus agreements in *The Capillo* case to not provide for the payment of war bonus during internment on land. Nowhere in their briefs or during their oral arguments did Appellants claim or contend

that this Court construed such agreements in *The Capillo* case otherwise.

In its various decisions in the present case this Court has not once referred to its decision in *The Capillo* case and, as far as its decisions reflect, no consideration was given by it to its previous and contrary construction of these same identical supplementary bonus agreements. The disregard by this Court of its prior decision in *The Capillo* case is all the more inexplicable considering that both the Appellants and the Appellee, in their respective briefs and during oral argument, claimed its applicability and relied upon it for support of their respective contentions and that this decision is the only reported decision by any court supporting the proposition that war bonus, in addition to wages, was payable to merchant seamen interned during World War II on land.

Although this Court in *The Capillo* case considered the war bonus period was the *voyage* of the vessel westerly from and easterly to the 180th Meridian, it now by interpolation in the provision defining trans-Pacific voyages in War Zone III creates a geographical war zone west of the 180th Meridian and places the men, the vessel and the voyage in such geographical zone. Suppose the voyage of the S.S. *President Harrison* were as described in War Zone II or V as set forth below:

> "II. Trans-Atlantic voyages to Russia (Archangel etc.) (Whole voyage)
>
> * * * *
>
> "V. Canada (Atlantic Ocean) (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port)"

Clearly these zones, as do all the zones defined in the agreements, relate to voyages of a vessel. In War Zone I this is further evidenced by the following terms: "Whole voyage", "if any vessel continues eastbound", "until the vessel crosses the 180th Meridian". In War Zone IV the commencement of the bonus period during trans-Pacific voyages to New Zealand or

Australia is prescribed as "From arrival of vessel in Suva or the crossing of the 180th Meridian."

It should always be kept in mind that these agreements dealt primarily with the subject of war bonus payable in respect to voyages of vessels on which the men were originally employed. The parties were concerned chiefly with the amount of extra compensation that was payable for exposure to war risks while employed on vessels engaged on war hazardous voyages and with what voyages qualified for such extra compensation. Internment or loss of the vessel was only an incident to this paramount consideration and the first three series of supplementary bonus agreements prescribing similar voyage bonuses made no reference whatsoever to such an eventuality (Bryan's Exs. Nos. 11-15, 17-21, 22-26, all inclusive).

In the fourth series of agreements between the Pacific American Shipowners' Association and the West Coast maritime labor unions, entered into in October, 1941 (Bryan's Exs. Nos. 47-51, inclusive), the rate of bonus and the voyages deemed to be hazardous for war causes were still the paramount considerations. In these agreements, however, appear for the first time an incidental provision dealing with the internment, destruction or abandonment of the vessel due to war causes. Repatriation of the men was a contemplated consequence of such a happening. Contemplation of internment of the *crew* was not indicated by any language in the agreements. Since repatriation might take place on other vessels engaged on similarly hazardous voyages, provision was made for the payment of war bonus in the same war zones or on the same voyages as was prescribed for men employed aboard vessels engaged on such voyages.

This type of war bonus was a "sailing" or voyage bonus and it was the standard pattern for war bonuses during World War II both before and after the entry of the United States. The war bonuses fixed by the Maritime War Emergency Board shortly after its creation were of the same type, i.e., voyage bonuses (Nielsen's Ex. Nos. 3, 4, 5, 6 and 7). During later stages of

the war, "Area Bonuses" and "Vessel Attack Bonuses" were also prescribed. (Nielsen's Ex. Nos. 9 and 10.) We respectfully urge the Court to read the Board's explanation of its Bonus Decision 2D on the first page thereof (See Appendix A, hereof).

THIS COURT'S CONSTRUCTION OF THE SUPPLEMENTARY BONUS AGREEMENTS PERTAINING TO LICENSED PERSONNEL IS EQUALLY ERRONEOUS AND INCONSISTENT WITH ITS PRIOR DECISION IN THE CAPILLO CASE

In its supplemental decision in the *Griffin* case dated May 28, 1949, this Court construed the supplementary bonus agreement with the National Organization of Masters, Mates and Pilots of America. The mimeographed copy of this agreement introduced in evidence as Bryan's Ex. No. 49 shows the date as October 10, 1941, whereas the original executed agreement bears the date October 20, 1941.*

In its supplemental decision in the *Griffin* case dated May 28, 1949, this Court states that if there be a difference between this supplementary bonus agreement and the rider attached to the shipping articles covering licensed personnel, the latter should control, being the *later* document. Since the agreement was actually dated October 20, 1941 and the shipping articles and the attached riders dated October 15, 1941, *the agreement* is the *later* document. This Court, however, then ruled there was no difference between the rider and the licensed personnel union

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*This error was called to the attention of the District Court and proctors for the Appellants were invited to confirm or disaffirm the same. No contrary contention was made by Appellants or their proctors. In Appellee's brief before this Court a footnote on page 4 calls attention to the fact that this agreement was dated October 20, 1941, although the mimeographed copy in evidence erroneously shows the date as October 10, 1941. None of the proctors for Appellants in their reply briefs, in their oral argument or in their written summary of the oral argument contested this statement as to the erroneous date shown on Bryan's Ex. No. 49.

agreements with respect to war bonus for licensed officers during internment. In quoting the provisions of the supplementary bonus agreements pertaining to deck and engine room officers, this court rearranged the order in which the quoted provisions actually appear in such agreements. We believe such rearrangement leads to an erroneous conception of the meaning and effect of the provisions. Accordingly, we set forth below to the left the arrangement of these provisions quoted in the supplemental decision by this Court in the *Griffin* case, and to the right the same provisions in the actual chronological order that they appear in the agreements:

COURT'S QUOTATION	ACTUAL CHRONOLOGICAL ORDER
"Subject to terms and conditions following, war bonuses shall be paid in the respective areas as above defined, as follows: . . .	"(2) War risk areas wherein war risk bonuses shall be paid to licensed officers are set forth as follows:
	* * * *
"Area IV 66-2/3% of basic wages from the crossing of the 180th meridian, westbound, until recrossing the same meridian eastbound . . .	*"Area IV*
	"Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula."
	* * * *
	"Subject to terms and conditions following, war bonus shall be paid in the respective areas as *above defined,* as follows:
	* * * *
	"Area IV. 66-2/3% of basic wages from the crossing of the 180th meridian, westbound, until recrossing the same meridian eastbound."
	* * * *
"(4) In the event a vessel is *interned,* destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port. (Emphasis supplied.)	

"While employees are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66-2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI."

"War risk areas wherein war risk bonuses shall be paid licensed officers are set forth as follows: . . .

Area IV Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula."

"(4) In the event *a vessel* is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be *repatriated* to a Continental United States port.

"While employees are in the *war zone areas described herein* war bonuses shall also be paid to them at the rate of 66-2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI."

When the foregoing pertinent provisions of the supplementary bonus agreements pertaining to licensed personnel are considered in the chronological order that they actually appear in the agreement, as set forth in the right-hand column above, it will be immediately recognized that the war risk area with which we are here concerned, to wit, Area IV, is defined only and solely as "Trans-Pacific voyages to Japan, etc." The first portion of the quoted paragraph (2) defines the war risk areas in terms of voyages with no reference whatsoever to the crossing or recrossing of the 180th or any meridian. The voyage is the war risk area. The second part of the quoted paragraph (2) provides the rate or amount of war bonuses that "shall be paid in the respective areas as *above defined.*" In respect to Area IV the rate of war bonus is 66-2/3% of the basic wages but it is provided that the payment of such bonus on such voyage or in Area IV "as above defined" commences only "from the crossing

of the 180th meridian, westbound, until recrossing the same meridian eastbound." The reference to the 180th Meridian, therefore, is clearly a restrictive provision limiting payment to that portion of the voyage west of the 180th Meridian. No reference to the 180th Meridian is found in that portion of paragraph (2) that *defines* the war risk areas. It is clear that no geographical area is contained in the definition of war risk areas. The same are defined only in terms of voyages.

Other provisions of these agreements make it equally clear that the war zone areas relate only to voyages of vessels. For instance, it is provided in paragraph (2) that "If any vessel referred to in Area I continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the *vessel* passes the 180th meridian, eastbound, and thereafter no further bonuses will be payable."

Provision is made in paragraph (2) for an automatic adjustment of bonus rates dependent upon an index "based upon the fair average of war risk insurance rates paid on hulls of American flag vessels operating in all areas above described." War risk areas, like war risk insurance rates on vessels, relate only to where vessels operate—obviously not on land.

In paragraph (4) of the licensed personnel agreements recognition is given to the hazards of internment, destruction or abandonment of the *vessel*—not the crew—as a result of war operations and to the inability of the vessel to continue, therefore, her voyage. In such event provision is made that basic wages and emergency wages shall be paid until crew members arrive at a Continental United States port and that they shall be repatriated to a Continental United States port. It is in this latter connection that provision is also made that while the men "are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66-2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI."

It will be seen from the above that although this Court did not have occasion to construe the supplementary bonus agree-

ments affecting licensed personnel in *The Capillo* decision, these agreements compel the construction that war bonus is payable only during voyages and not while crew members are interned on land, just as much as, if not more than, the supplementary bonus agreements involving unlicensed personnel which were interpreted by the Court in *The Capillo* decision. The internment provision of all these licensed and unlicensed union agreements (paragraph (4)) is practically identical in language except for the last or second sentence, which, however, is identical in effect, in that it immediately follows the provision obligating the employer to repatriate the employees to a Continental United States port and provides that war bonus is payable to such employees only while they are in war zones or areas defined or described in the agreements which consist of certain defined voyages. The internment provision of the riders, as discussed hereinafter, is almost word for word the same as the internment provision in paragraph (4) of the union agreements.

In its supplemental decision in the *Griffin* case, this Court referred to the fact that the supplementary bonus agreements were the result of extended prior negotiations. The Court failed to note, however, the significance of such prior negotiations. There is a significant reason why the supplementary bonus agreements affecting licensed personnel differ somewhat in form from the agreements affecting unlicensed personnel. The licensed personnel agreements were patterned, in large measure, after an agreement reached at a conference held in Washington, D.C., terminating August 16, 1941, attended by representatives of ship operators and unions of licensed officers throughout the United States. This conference, called by the United States Maritime Commission to bring about some measure of stability and uniformity in respect to war bonus rates, resulted in an agreement between these ship operators and unions of licensed personnel (Bryan's Ex. No. 34). It will be noted on page 4 of that agreement, that there is a provision dealing with internment, destruction or abandonment of the vessel. It is there

provided that on the happening of such eventuality licensed officers shall be paid wages to the date they arrive in the Continental United States port and that the shipping company shall make arrangements for repatriation of licensed officers to a Continental United States port. There is no provision in the agreement relating to the payment of war bonus following the happening of such an event. During the negotiations, however, that led to this agreement a proposal was made by the unions of licensed officers that war bonus should be paid while the men were repatriated (See Bryan's Ex. No. 33, page 4). This proposal was made a part of the sentence dealing with the repatriation of the men, as follows:

> "Furthermore, in such event arrangements shall be made by the company for repatriation of such men to a Continental United States port, and the bonus shall be paid while the men are in the danger areas described above."

It is obvious that the provision dealing with the payment of bonus relates to the repatriation of the men. This proposal by the unions of licensed personnel calling for the payment of war bonus during repatriation was rejected, however, by the representatives of the ship operators. The pencilled notations on Bryan's Ex. No. 33 were made by Mr. Bryan at the time of negotiations and show the striking out of this war bonus proposal (Ap. pp. 242-243*).

Although three series of supplemental war bonus agreements had been entered into between Pacific American Shipowners' Association and the various Pacific Coast maritime labor unions since the spring of 1940 (Bryan's Ex. Nos. 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26), the agreement with the unions of licensed personnel (Bryan's Ex. No. 34) entered into on August 16, 1941 was the first agreement containing any provision dealing with the consequences of intern-

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*Ap. designates the Apostles in the *Agnew* case unless otherwise indicated.

ment, destruction or abandonment of the vessel due to warlike operations. Mr. Bryan's testimony is undisputed that there had never been a previous demand for such provision except during the negotiations in May, 1941, when the Sailors' Union of the Pacific asked that wages—not bonus—be paid their members in the event of internment. This request, however, was refused (Ap. pp. 220-225, Bryan's Ex. Nos. 28 and 29).

The fourth series of supplementary bonus agreements entered into in October, 1941 with the unions representing unlicensed personnel were patterned after a decision and recommendation by the National Defense Mediation Board on October 4, 1941 (Bryan's Ex. No. 42). This decision followed hearings before that Board of a controversy concerning war zones and rates of war bonus to be paid members of the Sailors' Union of the Pacific, among others. The recommendations contained in the decision of the National Defense Mediation Board were incorporated in the supplementary bonus agreement negotiated with the Sailors' Union of the Pacific on October 9, 1941 (Bryan's Ex. No. 47). The agreement consummated with this union was then used as the model for the supplementary bonus agreements entered into with the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association on the same day, to wit, October 9, 1941 (Bryan's Ex. No. 48) and the Marine Cooks and Stewards Association of the Pacific Coast on the following day, to wit, October 10, 1941 (Bryan's Ex. No. 50).

It will be noted that the recommendations of the National Defense Mediation Board were incorporated almost verbatim in the three supplementary bonus agreements just mentioned, in respect to the definition of war risk zones or areas in terms of voyages. The decision of the Board, however, contained no recommendation dealing with the eventuality or consequences of the internment, destruction or abandonment of a vessel due to warlike operations.

The internment provision which was incorporated in the three supplementary bonus agreements just mentioned (paragraph 4)

was adopted from the uniform bonus agreement with unions of licensed personnel dated August 16, 1941 (Bryan's Ex. No. 34). A comparison of this internment provision contained in these various agreements demonstrates that the language is almost word for word the same.

However, on this occasion the Pacific American Shipowners' Association granted to these unions of unlicensed personnel the proposal made by the licensed personnel unions in August, 1941, calling for the payment of war bonus while men were being repatriated following the internment, destruction or abandonment of their vessel (Ap. pp. 243-244). In the drafting of this internment provision a change was made in punctuation and the obligation of the shipowner to repatriate the men was made a part of the first sentence of the internment provision and the provision relating to the payment of war bonus during repatriation was made the subject of a second sentence. This same pattern was followed in the supplementary bonus agreements with unions of licensed personnel (paragraph 4) entered into with the Marine Engineers Beneficial Association on October 15, 1941 (Bryan's Ex. No. 51) and with the National Organization of Masters, Mates and Pilots of America on October 20, 1949 (Bryan's Ex. No. 49).

The riders attached to the shipping articles of the *President Harrison* on October 15, 1941, were changed to conform to the internment provision incorporated in paragraph 4 of the unlicensed union agreements of October 9 and 10, 1941, and adopted the provision for the payment of war bonus during the repatriation of crew members. This is readily demonstrated by comparing the form of rider used by Appellee prior to this time (see Appendix C of Appellee's brief) with the form of rider used on the shipping articles of the *President Harrison* and other vessels of the Appellee sailing after October 9, 1941 (see Appendix A, B and D of Appellee's brief). The draftsmen of the internment provision in this new form of rider used by Appellee unhappily conformed too strictly to the language contained in paragraph 4 of the agreements and adopted the word

"herein" in reference to the term "war zones." The word "herein" as used in the supplementary bonus agreements obviously related to the war risk zones or areas defined in terms only of voyages of vessels and it is irrational to believe that the language of the rider intended anything different. In this respect it should be noted that the plural term "war zones" was also used in the rider as in the agreements. Not even the Appellants have contended there was more than one war zone defined in the rider whereas there were five or six war zones defined in the agreements to which the plural term "war zones" had reference.

The new form of rider used by Appellee on the shipping articles of the *President Harrison* also reflected the increase in war bonus rates made in the union agreements and enlarged the portion of the voyage eligible for bonus by changing the terminus from the 160th to the 180th Meridian as had been done in the agreements (compare Ex. D). This also is most convincing evidence that the new rider used by the Appellee on the *President Harrison* shipping articles was intended only to carry out the recently negotiated union agreements. This is even further demonstrated by the fact that the rider for licensed personnel (Appellee's brief, Appendix A) specified the rate of war bonus at the old and lower rate of 60%. Bearing in mind that the shipping articles were opened on October 15, 1941 and that the supplementary bonus agreement with the union of licensed engineers (Bryan's Ex. No. 51) was entered into on the same day and that the supplementary bonus agreement with the union of licensed deck officers (Bryan's Ex. No. 49) was entered into on October 20, 1941, it is readily understood why the licensed personnel rider attached to the articles did not reflect the new and increased war bonus rates of 66-2/3% specified in such agreements.

The parties in all of these consolidated cases and the unions representing all of Appellants have consistently recognized by their conduct and practical construction that these collective bargaining agreements consisting of the supplementary bonus

agreements were the controlling contracts, and that the riders were intended only to reflect the provisions of these paramount collective bargaining agreements. After the Appellants were repatriated, the licensed officers were paid war bonuses covering the period of the voyage of the *President Harrison* following its crossing of the 180th Meridian, westbound, until the capture of the vessel on December 8, 1941, not at the 60% rate prescribed in the licensed personnel rider but at the 66-2/3% rate prescribed in the supplementary bonus agreements (Ap. p. 523). Payments at these rates are undisputed.

Similar recognition by the parties in these consolidated cases that collective bargaining agreements as well as the shipping articles govern the terms of employment aboard ship, irrespective of whether such agreements are referred to in the shipping articles or not, is indisputably manifested by the payments made to Appellants following their repatriation to the United States in the form of wages, both for the period spent aboard the vessel prior to its capture on December 8, 1941 and for the period of internment and subsequent repatriation. These wages were measured not by the lower rates contained in the basic agreements in effect at the time the shipping articles were opened on October 15, 1941 and specifically referred to in the riders, but at increased rates provided for in basic agreements negotiated subsequently to October 15, 1941. (See discussion in Appellee's brief, pp. 28-31).

> "Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction may be considered by the court in construing the contract, determining its meaning, and ascertaining the mutual intention of the parties at the time of contracting; it is entitled to great, if not controlling, weight in determining the proper interpretation of the contract; and it will generally be adopted by the court."
>
> 17 C.J.S. 755-756.

See also:

San Francisco Iron & Metal Co. v. Sweet Steel Co., 23 F. 2d 783, 784 (9 C.C.A.).

THE COURT HAS INJECTED INTO SECTIONS 564 AND 676 OF 46 U.S.C. A PURPOSE AND EFFECT NEVER INTENDED, AND, IN CONSTRUING THESE STATUTES, HAS DISREGARDED THE NATURE AND EFFECT OF COLLECTIVE BARGAINING AGREEMENTS UNDER OTHER FEDERAL STATUTES WHICH ARE OF EQUAL, IF NOT PARAMOUNT, CONTROL

In its written decision in the *Agnew* case of May 18, 1949, this Court refers to Section 676, 46 U.S.C., and, in effect, holds that statute requires shipping articles be deemed the exclusive contract governing terms of employment of crew members aboard vessels. In its supplemental written decision in the *Griffin* case, dated May 28, 1949, this Court also refers to Section 564, 46 U.S.C., and impliedly, if not directly, ascribes to that statute a similar purpose and effect.

It is Appellee's position that while these statutes require written agreements in the form of shipping articles to be entered into between the master and crew, and while these statutes specify what subject matter is to be covered by shipping articles, they in no sense require that all terms of employment governing crew members aboard vessels must be set forth in the shipping articles, or even referred to therein, nor do they preclude other currently effective contracts to be entered into between the parties governing terms of employment of the crew members aboard vessels. Appellee emphatically contends that these statutes do not nullify, or preclude consideration of, collective bargaining agreements covering crew members which may govern the same, as well as different, terms of employment as those required to be set forth in the shipping articles by Sections 564 or 676, 46 U.S.C. Examples of terms of employment that are specified in collective bargaining agreements but not in shipping articles but which, nevertheless, are universally held operative and binding include, among others, overtime provisions fixing regular and overtime hours and rates of pay, transportation rights, uniform, clothing and meal allowances, holidays, working rules,

grievance machinery, etc. (For example, see Bryan's Ex. No. 55).

The principle here involved transcends in importance the result of this particular case and we believe upon reconsidering the matter this Court must conclude that these two statutes in no way interfere with the validity and effectiveness of co-existing collective bargaining agreements, which are the natural and intended result of collective bargaining under the National Labor Relations Act (29 U.S.C. 151 et seq.). Under the latter Act, as interpreted by the United States Supreme Court, employers are not only obligated to recognize representatives of their employees for purposes of collective bargaining, are not only required to engage in collective bargaining with such representatives, but, in addition, having reached an agreement with such collective bargaining representatives, are further required to reduce such agreement to writing and to sign the same. (*H. J. Heinz Co. v. National Labor Relations Board,* 311 U.S. 514, 61 S.Ct. 320, 85 L.Ed. 309.) It is inconceivable that upon the accomplishment of this objective, such collective bargaining agreements, so reduced to writing and executed, are not to be given full force and effect or are not to be recognized by the courts as binding and effective upon the parties thereto upon some theory that under statutes enacted years ago for the protection of seamen from harsh treatment, shipping articles exclusively govern terms of employment aboard vessels.

Collective bargaining agreements between shipowners and maritime labor unions concerning seafaring personnel necessarily, of course, relate to the terms of employment of such personnel aboard vessels. Under the ruling of this Court in the present case collective agreements are to be disregarded in determining the rights and obligations of a shipowner and the crew members employed aboard his vessel, unless the terms of such agreements are set forth or referred to in the shipping articles. Not only is this proposition contrary to the long-established practice in the shipping industry, but it is violative of, and in con-

flict with, the very objectives and purposes of the National Labor Relations Act, as well as common sense and sound policy.

This subject has been heretofore discussed at length by us in Appellee's brief (pp. 26-28), and we there pointed out the case of *Clayton et al. v. Standard Oil Co. of N. J.*, 42 F. Supp. 734, 1942 A.M.C. 61 (S.D. Tex.), where, although the collective bargaining agreement in question was not referred to in the shipping articles, the record showed the parties intended both it and the shipping articles to govern. The Court accordingly ruled:

> "The shipping articles between libelants and respondent and the agreement between the National Maritime Union and respondent, construed together, must be regarded as the contract between libelants and respondent."

This, we submit, is the sound rule that should be applied in such situations. Where it is clear, as in the present case, that the parties intend to be governed by a currently effective collective bargaining agreement as well as by the shipping articles, these two documents must be construed together as the contract governing the terms of employment of crew members aboard vessels. The record in the present case is replete with evidence demonstrating that all parties involved considered they were bound, not only by collective bargaining agreements referred to in the riders, but also by the supplementary bonus agreements, entered into at the same time, within a matter of days, that the shipping articles were opened on October 15, 1941. The record further demonstrates, without contradiction, that the parties also recognized as applicable and effective basic collective bargaining agreements which were not referred to in the shipping articles and which were subsequently negotiated and consummated in October and November, 1941, but made retroactive by express terms to October 1, 1941 (see discussion in Appellee's brief, pp. 38-31).

What we have stated above in respect to Sections 564 and 676, 46 U.S.C., is all the more understandable when consideration

is given to the nature and legislative history of these statutes. Section 676 found its origin in the Act of July 20, 1840, c. 48, 5 Stat. 394, 395, 397, and in the Act of February 27, 1877, c. 69, 19 Stat. 252. A careful analysis of Section 676 demonstrates that clause "Third", describing the contents of shipping articles, is purely incidental to the main purposes of the statute. We know of no other decision holding this statute requires all terms of employment of seamen aboard vessels to be set forth in the shipping articles.

Section 564, 46 U.S.C., was enacted subsequent to Section 676, and its main purpose more closely related to the provisions that are to be contained in shipping articles. This statute has its origin in the Act of March 3, 1897, c. 389, Section 19, 29 Stat. 691. The legislative history of this statute is discussed at length by the United States Supreme Court in *U. S. v. The Brig Grace Lothrop,* 95 U.S. 527, 24 L.Ed. 514. The statute was considered by the Circuit Court of Appeals for the Fourth Circuit in *U. S. v. Westwood,* 266 F. 696, where, at 697, the Court held, in part, as follows:

> "Shipping articles are mercantile documents, and are entitled to a liberal construction in order to accomplish the purpose the parties had in mind. They are not to be scrutinized as if they were legal pleadings."

The effectiveness of collective bargaining agreements concurrently with shipping articles conforming to Section 564, 46 U.S.C., was recognized by the United States Supreme Court in the case of *National Labor Relations Board v. Waterman Steamship Corp.,* 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704. In that case, the United States Supreme Court explained the purpose of this and similar statutes as follows (84 L.Ed. at 709):

> "The design was to protect seamen from being carried to sea against their will; to prevent mistreatment as to wages, and to assure against harsh application of the iron law of the sea during voyages."

We believe the situation of seamen today, with their membership in maritime labor unions, who diligently and vigorously

protect their rights, has been realistically and correctly stated by the trial court below (Ap. 566-568; 73 F. Supp. 948).

As we have heretofore stated, we believe the sound and logical rule to be, where it is clear, as here, that the parties intend to be bound by concurrently effective collective bargaining agreements as well as shipping articles, that these two documents must be taken together as the contract governing terms of employment aboard a vessel. We certainly challenge the proposition that, as between collective bargaining agreements and shipping articles, the latter contract is entitled to greater sanctity or is of paramount importance. In fact, if a choice must be made between the two contracts, it is the collective agreement, rather than the individual contract of hire in the form of shipping articles, that is paramount. We submit that the objectives of Sections 564 and 676, 46 U.S.C. and the National Labor Relations Act are defeated rather than served by ascribing to the former statutes a requirement that shipping articles must exclusively contain all terms of employment and by denying to seamen the protection afforded by collective bargaining in their behalf and the benefits obtained from resultant collective agreements.

The supplementary bonus agreements were effective and operative by their own express terms. As discussed in Appellee's brief, these collective bargaining agreements gave rise to valid enforceable obligations, binding both the employer and the employee (pp. 16-17). In Appellee's brief, we also cited and discussed authorities establishing the proposition that collective bargaining agreements, by law are not only made a part of individual contracts of hire, but cannot be changed by the terms of the latter. We also pointed out and discussed the enunciation of the principle by the United States Supreme Court in *J. I. Case Co. v. N. L. R. B.*, 321 U.S. 332, 64 S. Ct. 576, 88 L.Ed. 762, that individual contracts of hire are not immune to the operation of collective bargaining agreements because of the possibility that the former may be more individually advantageous. Such a

principle is as much protective of the rights of the employee as of the employer. Advantages granted to individuals by contracts of hire may be disruptive of industrial peace and may be the means of undermining the strength and effectiveness of collective bargaining representatives. Where a group of employees have chosen their collective bargaining representative, individual advantages, often gained at the expense of the employee group, must be foregone and should be considered as a contribution to the collective result (see Appellee's brief pp. 33-36).

The circumstances of the present case call for the full application of the foregoing principle. The supplementary bonus agreements involving unlicensed personnel were the result of collective bargaining; a deadlock; a submission of the controversy relating to war zones and the rates of war bonus to the National Defense Mediation Board; a decision by that Board recommending new and increased bonus rates, defining the war zones where payable, and prescribing machinery for the future adjustment of such war bonus questions; and further collective bargaining culminating in the incorporation of the recommendations of the Board in a collective bargaining agreement. These agreements were consummated only four or five days prior to the opening of the shipping articles of the *President Harrison* on October 15, 1941. As pointed out in Appellee's brief (pp. 36-38), the very provisions of these collective bargaining agreements indicated that all further individual action, other than through the collective bargaining process, was prohibited. Lockouts, strikes, slow-downs or like action were banned. Machinery was agreed upon for the adjustment of future questions.

In its supplemental decision in the *Griffin* case dated May 28, 1949, this Court stated that it is irrational to suppose that the Appellee entered into the shipping articles and the agreement created by the attached riders without intent that it was to be *the* binding agreement for the voyage. We submit that it is irrational to suppose that the supplementary bonus agreements were entered into on the various dates involved in October, 1941,

without intent by the parties that such collective bargaining agreements, effective by their own terms commencing October 1, 1941, would be *the* binding agreements for the voyage in respect to the subject of war bonus. These supplementary bonus agreements prescribed new and increased rates of war bonus; defined new war zones or areas; provided machinery for future adjustments of questions relating to such subjects; provided, for the first time, in so far as unlicensed personnel was concerned, for the payment of wages until the repatriation of the men to the United States, if the vessel were interned, destroyed or abandoned; and further provided for an obligation by the shipowner to repatriate the men and to pay them war bonus while in war zones during the course of such repatriation. It seems to us wholly illogical and irrational to deduce from these circumstances that, when the shipping articles were opened a few days later, on October 15, 1941, the parties intended by the riders, revised in form to conform with such agreements, to do anything other than to carry out and reflect this detailed agreement concerning war bonuses contained in the collective bargaining agreements consummated only a few days prior.

With the pattern established by the supplementary bonus agreements for unlicensed personnel entered into on October 9 and October 10, 1941, the statements above are equally applicable to the supplementary war bonus agreement covering the licensed engineers, executed on October 15, 1941, and the supplementary bonus agreement covering the licensed deck officers entered into on October 20, 1941.

What we have stated above in discussing the effect that should be given to Sections 564 and 676, 46 U.S.C., is wholly unrelated to a situation involving ambiguity in shipping articles and the question of admissibility of extrinsic evidence to remove or clarify such ambiguity. Existence of ambiguity in the shipping articles sets in force a wholly different, but equally forceful, argument for the consideration of evidence *dehors* the shipping articles to remove such ambiguity. A most recent enunciation

of the legal principles governing this situation, in a case also involving a claim by seamen for war bonus during internment on land, is found in *Mason v. Texas Co.,* 76 F. Supp. 318 (D.C. Mass. 1948); affirmed, 171 F.(2d) 559 (1 C.C.A.); certiorari denied, 69 S.Ct. 1156, 93 L.Ed. 1035. In that case, the District Court ruled as follows (at 321):

> "And as in the interpretation of any other contract where there is ambiguity, extraneous evidence is admissible to aid in the construction of ship's articles."

Another case remarkably similar to the present one, and involving a claim for the recovery of war bonus, is that of the *S. S. India Arrow,* 116 F.(2d) 8 (5 C.C.A.), which is discussed and extensively quoted in Appellee's brief (pp. 20-23). In that case, the Court was confronted with the problem of determining what was meant by the term "Spanish ports," and evidence of the genesis of the term was admitted and considered to show that the provision was adopted from a Maritime Commission contract which provided for payment of bonus only in ports of Spain. A most analogous situation exists in the present case by virtue of the ambiguity and incompleteness arising from the phrase contained in the riders, "war zones defined herein." As found by the District Court, and as we believe a fair construction by this Court requires, there is no war zone, and, much less, no war zones, defined in the riders. There is as much, if not more justification here to refer to the genesis of this term, i.e., the supplementary bonus agreements, as there was to refer to the genesis of the term "Spanish ports" in the case of the *S. S. India Arrow.*

It is, perhaps, pertinent to point out here another error contained in this Court's decision in the *Agnew* case of May 28, 1949. On page 4, this Court stated that the District Court reached its conclusion denying war bonus during internment "by holding that no war zone of the last sentence in paragraph 6 of the rider was 'defined' in the rider, and a supplemental war zone rules agreement, and hence it could determine the sailors'

contract with the owner by evidence *dehors* the rider and agreement." This is an erroneous conception of the District Court's decision. What the District Court actually found was that "Resort must be made to the supplementary bonus agreements in order to determine the real contractual intent of the parties in respect to the claim of the libelants for war bonus during their internment from December 8, 1941, to their repatriation to and arrival at a continental United States port. Such intent cannot and should not be determined from the riders alone." (Ap. 592-593).

The District Court's decision that the parties did not contract for the payment of war bonus during internment, therefore, did not depend upon evidence extraneous to the written contracts between them, consisting of the riders attached to the shipping articles and the supplementary bonus agreements. The ambiguity and incompleteness of the riders was resolved by the District Court by reference to the origin of this language found in another contractual document between the parties, to wit, the supplementary bonus agreements.

THIS COURT HAS REWRITTEN THE CONTRACTS BETWEEN THE PARTIES INSTEAD OF INTERPRETING THE SAME

We believe that the interpolations made by this Court in certain paragraphs of the riders quoted in its written decisions demonstrate as clearly as anything else the incompleteness and ambiguity of the riders in respect to the non-definition of war zones. We submit that if such provisions were complete and unambiguous, there would be no necessity to insert 19 words, as did this Court, in a 20-word clause to make it read as a war zone definition.*

We may again incidentally point out that the term used in the internment provision of the riders is a plural one, to wit, "war zones." Even with its interpolations in the provisions of

*In respect to paragraph 3 of the licensed personnel rider the court inserted 21 words in a 20-word clause.

the rider relating to crossing and re-crossing the 180th meridian, this Court has defined only one war zone. We submit even additional interpolations in such provisions of the riders cannot construct definitions of war zones as contrasted with a single zone. This in itself demonstrates that the war zones the parties had in mind, in the use of that plural term in the internment provision, are not to be found in the riders, and that resort must be made to the supplementary bonus agreements, where there are definitions of five or six different war zones.

The United States Supreme Court has repeatedly condemned the judicial creation of contracts rather than the interpretation of contracts actually entered into by the parties. In *Riddle v. Mandeville,* 5 Cranch. 322, 3 L.Ed. 114, at 116, Chief Justice Marshall stated that even a court of chancery will not create contracts into which parties have never entered, nor decree the payment of money from persons who have never undertaken to pay it. There are innumerable other decisions denouncing this practice.

> "This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them.
>
> *Sheets v. Selden,* 7 Wall. 416, 19 L.Ed. 166, at 169.

> "The case ought to be a very strong one, which should authorize a court to create, by implication, a restriction which the order of the language does not necessarily import or justify. It ought to be one in which no judicial doubt could exist of the real intention of the parties to create such a restriction."
>
> *Duvall v. Craig,* 2 Wheat. 45, 4 L.Ed. 180.

> "It is always competent for parties capable of entering into a business arrangement to fix the terms of it, and to declare what shall be their respective rights and liabilities under it. If the court can in any case see that this has been done, it is required to give effect to the contract which the parties chose to make for themselves, although, in the

absence of a special agreement on the subject, the rule to determine the rights of the parties might be different."

The Mayor and City Council of Baltimore v. Baltimore & Ohio R. R. Co., 10 Wall. 543, 19 L.Ed. 1043, at 1045.

"It is the province of courts to enforce contracts—not to make or modify them."

The Harriman, 9 Wall. 161, 19 L.Ed. 629, at 633.

"But courts cannot make for the parties better agreements than they themselves have been satisfied to make."

Green County v. Quinlan, 211 U.S. 582, 53 L.Ed. 335, at 342.

We have already commented upon the inconsistency of this Court's action in the present case in interpolating the definition of the pertinent war zone or area contained in the supplementary bonus agreements so as to create a geographical war zone or area, when, in its decision in *The Capillo* case, this Court, in construing the same provisions, stated "the war bonus period is during the ship's voyage westerly from and easterly to the 180th meridian."

THIS COURT HAS MISAPPLIED RULES OF CONSTRUCTION AND HAS DISREGARDED OTHER PARAMOUNT RULES OF CONSTRUCTION

In its decision in the *Agnew* case of May 28, 1949, this Court stated that, because the riders were prepared by the Appellee, they must be construed most strongly against it. This rule of construction is applicable only where the document in question is deemed to be ambiguous. This Court held, however, in the same decision—we submit, of course, erroneously—that the riders are not ambiguous. As stated in 12 Am. Jur. 796:

"The rule that expressions will be interpreted against the person using them applies only where, after the ordinary

rules of interpretation have been applied, the agreement is still ambiguous."

We accordingly submit that the application of this rule of construction is clearly erroneous on the face of the Court's decision, and is wholly inconsistent with its other finding that the riders were not ambiguous.

We contend, of course, that the riders are incomplete and ambiguous for the many reasons previously discussed. Even under such circumstances, however, this rule of construction has no place in the present case, because, by the application of other paramount and controlling rules of construction, the ambiguity is completely resolved and eliminated.

> "The general rule is that a contract will be construed against a party using words only if a satisfactory result cannot be reached by other rules of construction."
>
> *Amsterdam Syndicate, Inc. v. Fuller,* 154 F.(2d) 342, at 343 (8 C.C.A.).

> "The rule [that a written contract must be interpreted against the person responsible for ambiguities in it] is subservient to the rule which requires reference to attending circumstances to determine the meaning and purpose of the language used by the contracting parties."
>
> *Replogle v. Indian Territory Illuminating Oil Co.,* 143 P.(2d) 1002 (Okla. 1943).

The rule that, where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, "is the last one which the courts will apply, and then only if a satisfactory result cannot be reached by other rules of construction."

> 13 C. J. 545
> 17 C. J. S. 754

We have heretofore cited and discussed decisions—most pertinent to the present case because they also involve the recovery of war bonus—which stand for the proposition that extrinsic

evidence is admissible to clarify and remove ambiguities in written contracts, including shipping articles. As is, of course, well known by this Court, the rules of evidence in Admiralty courts are more liberal than those in common-law courts. There can be no doubt that in Admiralty, as well as in common-law courts, extrinsic evidence is admissible to clarify ambiguities contained in contracts. Authorities dealing with this subject in Admiralty cases are discussed in Appellee's brief (pp. 45-47).

There are numerous other rules of construction which are applicable to remove the ambiguity contained in the riders before resort may be made to the rule of construction applied by this Court resolving ambiguities against the party deemed responsible for it. In Appellee's brief, we have invoked the rule of construction calling for effect and reasonable meaning to be given to all parts of an instrument. We have cited the rule that calls for an interpretation giving effect to the apparent main purpose of the contract. Similarly, we have demonstrated that, in the interpretation of agreements, the prime object and purpose of the parties should be ascertained, and that ambiguity in minor provisions should be construed not to conflict with the main purpose. We have shown that words used in a certain sense in one part of a contract (the supplementary bonus agreements) are deemed to have been used in the same sense in another part of the contract (the riders).

The construction of the supplementary bonus agreements and the riders adopted by the District Court gives effect to the general purpose of the contract, does not render meaningless any specific term, but, on the contrary, gives meaning to and reconciles the paragraph in the riders referring to the 180th meridian, and consequently ascribes to the plural term "war zones" in the riders the same sense in which this term is used in the balance of the contract; i.e., in the supplementary bonus agreements. The interpretation adopted by this Court does violence to, and conflicts with, all these accepted rules of construction (see discussion in Appellee's brief, pp. 41-44).

In Appellee's brief, we have also discussed the finding by the District Court (Ap. 595, 599) that the shipping articles with attached riders and the supplementary bonus agreements were writings and contracts relating to the same matters and entered into by and in behalf of the same parties, at substantially the same time, and are parts of substantially one transaction, and that, accordingly, these documents all must be taken together as parts of the same or a single transaction. We have also discussed United States Supreme Court and California authorities enunciating this rule of construction (see Appellee's brief, pp. 31, 32).

In its decisions, this Court also applied the principle that contracts must be interpreted liberally in favor of seamen, in line with the traditional solicitude of the courts of Admiralty for their physical and economic well-being. We have already commented on the protection afforded the Appellants in this case through the vigilant efforts of their unions, and have pointed out the realistic appraisal made of these circumstances by the District Court in its written decision. We submit that such principle, even if not outdated, has no application to collective bargaining agreements nor to riders attached to shipping articles which are intended only to conform to such agreements and are not the subject of separate negotiation.

THIS COURT FAILED TO CONSIDER THE APPLICABILITY OF DECISIONS OF THE MARITIME WAR EMERGENCY BOARD WHICH PRECLUDE RECOVERY OF WAR BONUS BY APPELLANTS DURING INTERNMENT ON LAND.

In respect to the claim of Appellants for war bonus during internment on land, we urged before the District Court, and have heretofore urged before this Court, consideration of the applicability of the decisions of the Maritime War Emergency Board only in the event that there was disagreement with our contentions that the shipping articles with attached riders and the supplementary bonus agreements did not provide for the

payment of war bonus during internment on land. The riders attached to the shipping articles, the supplementary bonus agreements, and the decisions of the Maritime War Emergency Board *all* provided for the payment of wages during internment. Since the Appellee paid Appellants, upon their repatriation, wages during the entire period of their internment and subsequent repatriation, and since the recovery of wages for these periods is not in controversy, it makes no difference whether the payment of these wages by Appellee was in discharge of its obligations under the riders attached to the shipping articles, the supplementary bonus agreements, or the decisions of the Maritime War Emergency Board. Furthermore, if it is held that the shipping articles with attached riders and the supplementary bonus agreements do not provide for the payment of war bonus during internment on land, it is also immaterial whether the decisions of the Maritime War Emergency Board superseded these previous contractual instruments in such respect.

However, in view of the decisions of this Court in the present case holding that the riders attached to the shipping articles and the supplementary bonus agreements are to be construed as allowing the recovery of war bonus during internment on land, it becomes vital and necessary to consider the applicability and effect of the decisions of the Maritime War Emergency Board. Despite this fact, this Court did not pass on or determine this vital issue in its decisions in the present case.

We are mindful that, in its decision in *The Capillo* case, this Court, on the basis of the record then before it, held that the decisions of the Maritime War Emergency Board were not effective or controlling. This view, taken by this Court, was predicated on four grounds. The first ground related to the construction of the term "in effect" contained in the Capillo rider, and it was held that this term did not mean "hereafter to be made." This ground, of course, is not applicable to the present case, where the construction of such a term is not in question.

The second ground was based on the belief by this Court that jurisdiction of the Maritime War Emergency Board depended upon the existence of a dispute between a steamship operator and a union. The record in the present case clearly demonstrates that the jurisdiction of the Board was not limited in such respect and that it exercised the powers granted to it continuously and on its own initiative, and quite irrespective of whether ship operators and unions had any disputes respecting the rates of war bonus payable or the voyages in respect to which war bonus was payable. This is demonstrated, without contradiction in the record, by the deposition of Erich Nielsen, Secretary of the Maritime War Emergency Board (Ap. 62-118). This proposition is also made indisputably clear by a single exhibit contained in the record (Nielsen's Exhibit No. 18; see also 1944 A.M.C. 1020). In addition to the District Court in *The Capillo* case, which took an opposite view, the views of this Court, as expressed in *The Capillo* decision, and based, of course, solely on the record in that case, were not shared by the District Court in *Mason v. Texas Co.*, 76 F. Supp. 318 (D.C. Mass.) decided on February 24, 1948, or by the United States Court of Appeals for the First Circuit, which affirmed the District Court's decision in the case cited on January 5, 1949 (171 F.(2d) 559). Certiorari was denied by the United States Supreme Court in this case on May 31, 1949 (69 Sup. Ct. 1156; 93 L.Ed. 1035). The District Court in *Montoya v. Tide Water Associated Oil Co.*, 79 F. Supp. 677 (S.D. N.Y.) in its decision rendered April 21, 1948, also adopted a contrary view to that of this Court.

As a third ground for rejecting the decisions of the Maritime War Emergency Board in *The Capillo* case, this Court held there was no evidence that the membership in the unions to which the Appellants belonged authorized their unions to submit the question of interpretation of their private contracts to the Maritime War Emergency Board. No such question was raised by any of the courts in *The Mason* case or *The Montoya* case, supra, and no contention has been made by the Appellants in this case that the unions to which they belong had no authority,

in behalf of the membership, to enter into the contract called the "Statement of Principles" (Nielsen's Exhibit No. 1) by which the Maritime War Emergency Board was created and empowered to act.

The decisions of the Maritime War Emergency Board regulated the payment of war bonus to merchant seamen during the entire period of the participation by the United States in World War II, and, on the basis of such decisions, literally millions of dollars were paid by the United States Government by way of war bonuses to merchant seamen employed aboard vessels engaged on voyages declared to be war zones. We believe it inconceivable that the creation and empowering of this Board by contract was an unauthorized act on the part of the signatories to the Statement of Principles, including all of the maritime labor unions to which the respective Appellants in the present case belonged.

The fourth ground relied upon by this Court in *The Capillo* case for rejecting the decisions of the Maritime War Emergency Board was based upon a construction of Decision No. 5, Revised, of the Maritime War Emergency Board (Nielsen's Exhibit No. 8) issued by the Board on February 21, 1942. This Court stated that this decision "does not purport to apply to cases of specific shipping article agreements between seamen and shipowners, much less to those prior to the agreement of December 19, 1941, when the Board was created."

Both the District Court and the United States Court of Appeals for the First Circuit in *The Mason* case, supra, held that war bonus provisions contained in a collective bargaining agreement dated August 1, 1941, were superseded by the subsequent decisions of the Maritime War Emergency Board. A similar result was reached in *The Montoya* case, where the decisions of the Board were incorporated by reference in the shipping articles.

We submit that an analysis of Decision No. 5, Revised, compels the conclusion that this decision superseded and supplanted shipping articles and collective bargaining agreements on Febru-

ary 21, 1942, in respect to all matters covered by the decision, including payments to be made merchant seamen during their internment.

The last paragraph on page 2 of the decision provides for the effective dates of the various articles contained in the decision. Under this paragraph, Decision No. 5, Revised, was not retroactive in the present case to December 7, 1941, in respect to the payment of basic wages and emergency wages during internment, because an agreement to make these payments existed. Thus, the decision was inoperative in the present case between December 7, 1941, and February 21, 1942, as to these features. This is inconsequential, however, because basic wages and emergency wages were paid to the Appellants. Article 6 of the decision, however, was made effective as of the date of the decision, to wit, February 21, 1942, irrespective of the existence of any agreements contained in shipping articles or collective bargaining contracts, conflicting or not. It should be borne in mind in this connection that, by the opening statement of the signatories contained in the Statement of Principles, uniformity of treatment in respect to the payment of war bonus was a primary objective. This opening paragraph reads as follows:

> "In so far as areas, war bonuses and insurance are concerned, it is regarded as desirable and necessary that a uniform basis for each item covering the entire nation and the entire industry be reached."

Further light on the intent of the parties in creating and empowering the Maritime War Emergency Board is found in the following language contained in Exhibit A, attached to, and made a part of, the Statement of Principles:

> "Under present war conditions, however, neither the unions nor the steamship operators will at all times be in a position to obtain adequate information with respect to the extent of war risks in order to enable them to bargain intelligently with respect to questions relating to war risk compensation and insurance of the personnel of such vessels.

"In order to afford a procedure for settling questions relating to war risk compensation and insurance which will at the same time insure that the consideration thereof shall be based upon adequate and accurate information and that such questions shall be settled in such manner as shall most certainly assist in the prosecution of the war, it is proposed that there shall be established a board to be known as the Maritime War Emergency Board (hereinafter sometimes called the Board) or by some other suitable name, and to be composed and have the powers and duties hereinafter set forth."

What the Board intended and provided in respect to making retroactive Decision No. 5, Revised, was to exempt from retroactivity those situations in which payments had already been made under contractual commitments for the same in the form of shipping articles or collective bargaining agreements. However, on the effective date of the decision, to wit, February 21, 1942, it was intended and provided that henceforth payments made to merchant seamen whose vessels were lost or captured during the war, or who were interned, should be made on a uniform basis. In order to obtain such uniformity on the effective date of the decision, the same, of course, superseded and supplanted any other contractual provision conflicting therewith.

Maritime unions which are collective bargaining representatives of the various categories of merchant seamen, like other unions, have power, and exercise that power, to amend previously existing contractual arrangements made by them in behalf of their membership. Immediately upon its creation, the Maritime War Emergency Board issued decisions raising the rates of war bonus on voyages in various danger areas throughout the world. Understandingly, with the entry of the United States in World War II, voyages of vessels into various areas became increasingly hazardous. Needless to say, the merchant seamen represented by the maritime labor unions, which, in their behalf, joined in the creation of this Board, benefited by the decisions of the Board and the protection afforded under its decisions.

If, in some instances, and by virtue of special circumstances, it developed that some merchant seamen might receive less under the decisions of the Maritime War Emergency Board than under their previous contractual arrangements, such result must be considered as a necessary contribution to the desired and necessary objective of uniformity for the collective benefit of all merchant seamen on American-flag vessels.

It is, of course, clear that Article 6 of Decision No. 5, Revised, does not provide for the recovery of war bonus during internment on land. A reading of this provision forces such conclusion, and the proposition stated has been held in both the *Mason* and *Montoya* cases, supra.

Accordingly, if this Court adheres to its views as expressed in its decisions—which we, of course, submit are erroneous—that the riders attached to the shipping articles and the supplementary bonus agreements provided for payment of war bonus during internment on land, such obligations under these agreements were supplanted and superseded on February 21, 1942, by Decision No. 5, Revised, which provided that, from that time on, interned seamen, including Appellants, were not entitled to war bonus during their internment on land. We believe the Appellee is entitled to a decision and determination on this issue in the present case. As we have heretofore pointed out, however, the applicability of Decision No. 5, Revised, and other decisions of the Maritime War Emergency Board is of no consequence or materiality if it is held that the riders attached to the shipping articles and the supplementary bonus agreements do not provide for the payment of war bonus during internment on land, as was the finding and ruling of the District Court in this case.

In respect to the position of the Appellee pertaining to the applicability of the decisions of the Maritime War Emergency Board during the repatriation of the Appellants, we respectfully refer the Court to the discussion of this point contained in Appellee's brief (p. 55).

IN ADDITION TO THE NECESSITY FOR CORRECTION OF THE FOREGOING ERRORS, THERE ARE MANY OTHER REASONS FOR GRANTING A REHEARING IN THE PRESENT CASE.

This Court's original opinion in the *Agnew* case, dated May 5, 1949, was amended on May 6th and again on May 18th. This Court's *per curiam* opinion in the *Griffin* and *Federer* cases on May 6, 1949, was set aside by its subsequent decision on May 19, 1949, and in the *Griffin* case, a supplemental decision was issued on May 28, 1949. These amended and changed decisions in themselves suggest doubt on the part of the Court, at least, in respect to its original conception of the issues. In its decision in the *Agnew* case of May 5, this Court confused the terms "emergency wage increase" and "emergency wages" as used in the riders, despite the stipulation that the former term meant "war bonus," and decreed the payment of war bonus during repatriation east of the 180th Meridian, which was not even claimed or contended for by the Appellants. The Court also, in this original decision, stated it was unreasonable to suppose that war bonus during the period of internment of the crew would not be provided for, because of world-wide knowledge of the rape of Nanking. *The China Handbook (1937-1943)*, compiled by the Chinese Ministry of Information (McMillan, 1943), states, at page 851, that Japanese atrocities, now commonly termed "the rape of Nanking," commenced on December 13, 1937, following the siege laid to the city on December 7th, and that such looting continued for approximately five months. If such a basis was used for the supposition that war bonus would be provided for during internment, it would be reasonable to expect that shipping articles and collective bargaining agreements dealing with this subject would have so provided commencing in the early part of 1938 even before the commencement in Europe of World War II in 1939.

Appellee introduced supplementary bonus agreements, arrived at by the collective bargaining process, entered into between its representative and all the maritime labor unions representing the

Appellants, commencing with a series of agreements consummated in the spring and summer of 1940 (Bryan's Exs. Nos. 11 to 15 inclusive). The second series was entered into on February 10, 1941 (Bryan's Exs. Nos. 17 to 21 inclusive), and the third series on May 19, 1941 (Bryan's Exs. Nos. 22 to 26 inclusive). Not only was there no provision in any of such collective bargaining agreements for the payment of war bonus during internment, but there was no provision for the payment of wages during internment or, in fact, no provision even contemplating the internment, destruction, or abandonment of vessels, and much less the internment of crews.

The United States Court of Appeals for the First Circuit in *Mason v. Texas Co.,* supra, at page 561, held with reference to a collective bargaining agreement in that case dated August 1, 1941:

> "When the collective bargaining agreement was written, the United States was not at war, and its seamen were not being interned. The language of the agreement affords little basis for a conclusion that the parties contemplated that the United States would soon become a belligerent or anything more than that the company would fulfill the obligations of subparagraph 3(c) toward captured officers being repatriated in accordance with the usual treatment given seamen of neutral nations."

Other statements appearing in the amended decisions of this Court in the present case are erroneous in minor respects. For instance, reference is made in the *Agnew* decision to internment in Japan, whereas the internment of Appellants was in China (Ap. pp. 159-163). In the *Griffin* and *Federer* decision of May 19th, the Appellants in both of these cases are described as unlicensed personnel, whereas, as shown by the Court's supplemental decision in the *Griffin* case, all of the Appellants in that case were licensed personnel.

An unusual situation was presented at the time of oral argument of these consolidated cases. The Chief Judge who later participated in the decision was absent, and, upon the agree-

ment of the parties, the argument was made before only two Circuit Judges. In view of the reliance placed by this Court on oral argument, and in view of the extreme importance of this case to both the Appellants and the Appellee, a re-hearing should be granted to afford the parties an opportunity to be heard, and for their oral arguments to be considered, by all three Judges participating in the decision.

Appellants in the three consolidated cases comprise only 86 out of a total of 172 seamen and officers aboard the *S.S. President Harrison* at the time of its capture by the Japanese. The decision in these cases will be determinative of similar issues pertaining to all other crew members. The monetary amount involved, therefore, is far greater than even the very large amount now recoverable by the Appellants under this Court's decisions.

Furthermore, there are two other cases on appeal, or in the process of being appealed, to this Court which involve similar issues. The case of *Philip Nelson v. American President Lines Ltd., and United States of America* (No. 12,191) is presently before this Court on appeal. There is included in that case a claim for war bonus during the period of internment. Another group of libels by former crew members of the *S.S. Malama* against Matson Navigation Company, in which case the United States of America is impleaded as a respondent, is presently in the course of being appealed to this Court from a decision by the same District Court (N.D. Cal.) which decided the present case and which, as here, denied recovery of war bonus during internment on land (unreported, Final Decree entered March 24, 1949).

The decision of this Court in the present case may be largely, if not wholly, determinative of the issues in the other two cases mentioned. A large monetary amount is likewise involved in the *Malama* case. In the latter case, this Court will be called upon to construe riders attached to the shipping articles of the *S.S. Malama* (included in Exhibit H) containing an internment provision in the form set forth in Appendix F of Appellee's

brief. In that internment provision, the second sentence reads as follows:

> "War risk bonus at the rates specified in subdivision (b) of paragraph 1 of the supplementary agreements between the parties shall be paid while employees are in the war zones defined therein."

It will be noted that, in the *Malama* rider quoted above, express reference is made to the supplementary bonus agreements, not only for ascertainment of the amount of bonus payable, but also for definition of the war zones wherein such bonus is payable. This Court, in that case, will be called upon to determine whether the war zones defined in the supplementary bonus agreements, which are the same in that case as in the present case, are geographical areas which encompass internment on land, or whether such war zones are defined in terms of voyages, as was held by this Court in *The Capillo* case. Accordingly, in *The Malama* case, as in the present case, this Court will be called upon to either sustain its construction of the supplementary bonus agreements in *The Capillo* case, or to sustain its construction of the supplementary bonus agreements in the present case, and in view of the direct conflict between its decisions, to overrule one or the other of such decisions. Such circumstances, we believe, furnish abundant additional reasons for granting a re-hearing in the present case.

Furthermore, the Appellants themselves have petitioned for a modification or amendment of this Court's decisions.

Under all of the foregoing circumstances, the Appellee respectfully petitions this Court to reconsider its decisions in the present case and to correct the errors discussed above.

Respectfully submitted,

LILLICK, GEARY, OLSON, ADAMS & CHARLES,
IRA S. LILLICK,
JAMES L. ADAMS,
Proctors for Petitioner and Appellee.

CERTIFICATE OF COUNSEL

As counsel for American President Lines, Ltd., petitioner in the above Petition for Rehearing, I hereby certify that, in my judgment, the Petition is well-founded and that it is not interposed for delay.

JAMES L. ADAMS,

(Appendix follows)

APPENDIX A

Maritime War Emergency Board*
Decision 2D
Bonus

In view of the cessation of hostilities with Japan and the occupation of that country by United States Military forces, the Maritime War Emergency Board today announces additional adjustments in war risk bonuses, which are paid to seamen employed on vessels of the American Merchant Marine. These adjustments have been incorporated in this Decision 2D, which is effective October 1, 1945, and which supersedes all previous bonus decisions of the Board.

BASIS FOR DECISIONS OF THE BOARD.

Soon after Pearl Harbor, in order to resolve the potentially continuous disputes between the shipowners and the maritime unions over the issue of bonuses incident to war risks and changes in war risks; to eliminate the chaotic basis for the determination of bonuses in individual disputes; to provide an agency for securing confidential war risk information not accessible to the parties; to provide equitable uniformity in establishing war risk bonuses; to promote stability in the maritime industry; and to facilitate the successful prosecution of the war against the Axis powers, the Maritime War Emergency Board was established by the shipowners and the maritime unions signatory to the Statement of Principles.

In fulfillment of these responsibilities and accordingly to resolve the continuing general disputes on the basis of such confidential information with regard to war risks and changes in war risks on all the oceans, which the Maritime War Emergency Board was created to adjudge on a global basis, the Board from time to time raised the bonuses on a national industry-wide scale as risks increased with the advances of the Axis powers, and, in

*Nielsen's Ex. No. 10.

like manner, reduced the bonuses as risks decreased with the retreats and defeats of the Axis powers.

In accordance with its responsibilties under the Statement of Principles the Board has issued several bonus decisions. During the war years the distribution of war risk at sea has not been constant. In the first years of the war there was a pervading risk on all oceans. Therefore, the earlier decisions of the Board placed greater emphasis on increases in voyage bonuses. With the onset of offensive action by the Allied Nations, risks became intensified and concentrated in the active theaters of war. Therefore, the Board made provision for special area and attack bonuses, and began to decrease voyage bonuses. In so doing, the Board gave consideration to a policy of making decreases in voyage bonuses in several steps. As a part of this policy, the Board indicated in anticipation of V-E Day that a global voyage bonus floor of 33-1/3% ($40 minimum) would be maintained as long as there were hostilities on any ocean.

Now, however, hostilities have terminated on all oceans. Consequently, over-all war hazard at sea no longer exists. Therefore, the Board has eliminated all voyage bonuses. However, the Board finds that some risk still exists, but only in specific areas and only by reason of residual hazards, such as mines. Therefore, the Board has retained the vessel attack bonus unchanged, and has continued the area bonus in a modified form as compensation for these residual hazards.

Nos. 11,943, 11,944, 11,946

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES W. AGNEW, JR., et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,943	
JOHN W. GRIFFIN, et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,944	CONSOLIDATED CASES
AUGUST FEDERER, et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,946	

MOTION TO STAY MANDATE

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

American President Lines, Ltd., a corporation, Appellee in the above-entitled consolidated causes, hereby respectfully moves this Court, in the event that its Petition for Rehearing, filed

concurrently herewith, be denied, for an order staying the issuance of the mandate in each of said causes for a period of ninety (90) days after denial of said Petition, in order to allow Appellee to prepare and file a Petition for Writ of Certiorari in the office of the Clerk of the Supreme Court of the United States, and, thereafter, until such time as the said Petition for Writ of Certiorari may be granted or denied and, if granted, until the final determination of the cause.

Dated: July 15, 1949.

LILLICK, GEARY, OLSON, ADAMS & CHARLES,
IRA S. LILLICK,
JAMES L. ADAMS,
Proctors for Appellee.